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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 United States of America,
9 Plaintiff,
10 v.
11 Margo Cruz,
12 Defendant.

13 No. CR-18-00827-001-PHX-DGC
14 **ORDER**

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16 Defendant Margo Cruz is charged with conspiracy and possession with intent to
17 distribute cocaine. Doc. 1 at 1-2. Four kilograms of cocaine were found in his vehicle
18 after a drug-detecting dog alerted to the vehicle following a traffic stop. Defendant filed a
19 motion to suppress evidence obtained as a result of the stop, which the Court denied. *See*
20 Docs. 39, 79. Defendant now asserts a second motion to suppress, focused on evidence
21 obtained from a pole camera used to surveil the house of his co-defendant. Doc. 91. The
22 motion is fully briefed, and no party has requested oral argument. Docs. 97, 100. The
23 Court will deny the motion.

24 **I. Background.**

25 The facts in this order are based on the briefing by the parties and evidence presented
26 during the hearing on Defendant's first motion to suppress. *See* Doc. 79.

27 On December 19, 2016, Special Agent Kyle Stalder of the Drug Enforcement
28 Administration ("DEA") was conducting video surveillance of a residence at 5123 East

1 Red Bird Lane in San Tan Valley, Arizona (“the Residence”), by means of a pole camera.
 2 The pole camera had been installed after the DEA received information that co-defendant
 3 David Gallego-Machado was using the Residence as a “drug and/or drug proceeds storage
 4 location.” Doc. 44 at 1-2. The pole camera was located about 25 feet in the air on a power
 5 pole, approximately 75 yards from the Residence, across a vacant lot, and focused on the
 6 front of the house, including the driveway and garage. The Residence had no fence or
 7 landscaping that obstructed a full view of the house. *See* Doc. 91-1 at 4.

8 At approximately 11:01 a.m., Agent Stalder saw a silver Jeep Cherokee registered
 9 to Gallego-Machado depart from the residence. Around noon, the Jeep returned, driving
 10 in tandem with a white sedan that Agent Stalder thought was either an Infiniti or a Jaguar.
 11 The white vehicle had yellow license plates. Agent Stalder could not zoom the camera
 12 quickly enough to read the plates, but he had received information that the drug trafficking
 13 operation was sending drugs to New Mexico and assumed the yellow plates were New
 14 Mexico plates. *See* Court’s Livenote Transcript, July 12, 2019 (“Tr.”) at 10.¹ The white
 15 sedan entered the garage of the Residence and the garage door was closed. After about 11
 16 minutes, the garage door opened and the white vehicle pulled out and left the area. *Id.*

17 Anticipating that the vehicle was headed to New Mexico, Agent Stalder contacted
 18 Navajo County Sheriff Office (“NCSO”) Sergeant William Murray and explained that the
 19 DEA was surveilling the Residence and a suspicious vehicle just left. Tr. at 12. Sergeant
 20 Murray suggested Agent Stalder contact NCSO Deputy Randall Keith, who was on patrol.
 21 Tr. at 12. Deputy Keith is part of the NCSO Traffic Enforcement and Criminal Interdiction
 22 Unit. Doc. 44 at 3. Agent Stalder contacted Deputy Keith, relayed the information, and
 23 sent him a picture of the white vehicle taken from the pole camera. Tr. 20-21; *see also*
 24 Tr. at 40. This communication is not documented in DEA or NCSO reports, but the Court
 25 found the testimony of Agent Stalder and Deputy Keith credible on this point.

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 28 ¹ The Court takes judicial notice that standard license plates issued by New Mexico
 are yellow. *See* MVD New Mexico, <http://www.mvd.newmexico.gov/standard-plates.aspx> (last visited Oct. 16, 2019).

1 At approximately 3:50 p.m., Deputy Keith initiated a traffic stop of the white Infiniti
 2 sedan with New Mexico plates that Defendant was driving east on I-40 in the Holbrook
 3 area, heading toward New Mexico. After Deputy Keith's drug-detection canine alerted to
 4 the trunk of Defendant's vehicle, Deputy Keith searched the trunk and found four vacuum-
 5 packed rectangular packages of a white powdery substance in the spare tire compartment.
 6 Doc. 44 at 6. *Id.* Testing revealed that the powdery substance was cocaine. *Id.*

7 Defendant moves to suppress all evidence obtained by use of the pole camera. He
 8 argues that the pole camera was installed without a warrant, that he had a reasonable
 9 expectation of privacy at the Residence, and that surveillance by the pole camera violated
 10 his Fourth Amendment rights. Doc. 91. Because the Court concludes that Defendant had
 11 no reasonable expectation of privacy at the Residence, it need not address whether
 12 surveillance by the pole camera was otherwise lawful under the Fourth Amendment.²

13 **II. Defendant Lacked a Reasonable Expectation of Privacy.**

14 In *Minnesota v. Carter*, 525 U.S. 83 (1998), a law enforcement officer looked
 15 through a gap in the closed blinds of a first-floor apartment and observed a narcotics bagging
 16 operation. *Id.* at 85. Officers detained two males in a vehicle after they left the apartment.
 17 A search of the vehicle revealed a firearm, pagers, a scale, and cocaine. *Id.* A subsequent
 18 search of the apartment revealed cocaine residue and additional plastic baggies. *Id.* at 86.
 19 One of three males observed inside the apartment had leased the premises, while the other
 20 two had traveled from another state for the purpose of packaging the cocaine. *Id.* The two
 21 males filed a motion to suppress the evidence obtained from the apartment and the vehicle,
 22 arguing that it constituted the fruit of an unlawful search by the law enforcement officer
 23 who looked through the window without a warrant. *Id.*

24 The Supreme Court explained that "that in order to claim the protection of the Fourth
 25 Amendment, a defendant must demonstrate that he personally has an expectation of privacy

27 ² Both parties cite cases addressing the warrantless use of pole cameras. Courts in
 28 this district have held that such cameras, when focused on public spaces, do not violate the
 Fourth Amendment. *See United States v. Brooks*, 911 F. Supp. 2d 836, 841-42 (D. Ariz.
 2012); *U.S. v. Krawczyk*, 2013 WL 2481275, at *4 (D. Ariz. 2013). The government cites
 many cases that have reached the same conclusion. *See* Doc. 97 at 11-13.

1 in the place searched, and that his expectation is reasonable[.]” *Id.* at 88. Although
2 “an overnight guest in a home may claim the protection of the Fourth Amendment, . . . one
3 who is merely present with the consent of the householder may not.” *Id.* at 90. The Court
4 reached the following conclusion with respect to the two defendants before it:

5 Respondents here were obviously not overnight guests, but were essentially
6 present for a business transaction and were only in the home a matter of
7 hours. There is no suggestion that they had a previous relationship with
8 Thompson [the fellow who leased the apartment], or that there was any other
9 purpose to their visit. Nor was there anything similar to the overnight guest
10 relationship in [*Minnesota v. Olson*, 495 U.S. 91 (1990)] to suggest a degree
11 of acceptance into the household. While the apartment was a dwelling place
12 for Thompson, it was for these respondents simply a place to do business.

13 525 U.S. at 90 (footnote omitted).

14 The Court held that due to “the purely commercial nature of the transaction engaged
15 in here, the relatively short period of time on the premises, and the lack of any previous
16 connection between respondents and the householder,” the defendants had no reasonable
17 expectation of privacy in the apartment and could not assert a Fourth Amendment violation.
18 *Id.* at 91.

19 *Carter*’s holding applies here. The pole camera was focused on the Residence of
20 the co-defendant, not on property owned or occupied by Defendant. Defendant visited the
21 Residence for the sole purpose of engaging in a commercial drug transaction. As the
22 government notes without dispute from Defendant, the co-defendant’s fingerprints were
23 found on the cocaine packages located in Defendant’s trunk, showing that the packages
24 were obtained from the co-defendant. Doc. 97 at 6 n.3. Defendant visited the Residence
25 only briefly – for 11 minutes according to the time shown on the pole camera film. And
26 Defendant provides no evidence that he had any previous connection with the co-defendant
27 or the Residence. Thus, like the defendants in *Carter*, Defendant lacked any reasonable
28 expectation of privacy in the Residence and cannot assert a Fourth Amendment violation
based on surveillance of the Residence.

1 This decision is reinforced by the Ninth Circuit's decision in the *Lyall v. City of Los*
 2 *Angeles*, 807 F.3d 1178 (9th Cir. 2015). *Lyall* held that plaintiffs who were attending a
 3 musical event in a warehouse could not assert a Fourth Amendment violation based on a
 4 warrantless search of the warehouse and its occupants. 807 F.3d at 1187-88. The plaintiffs
 5 had no ownership in or control of the warehouse, and thus could not assert a trespassory
 6 violation as in *United States v. Jones*, 565 U.S. 400 (2012). *Id.* And as mere temporary
 7 guests on the property, they had no reasonable expectation of privacy:

8 [T]hey have no grounds on which to claim a reasonable expectation of
 9 privacy in the warehouse. They happened to be inside the warehouse when
 10 the police entered, but that fact, without more, is insufficient to confer Fourth
 11 Amendment standing. *See Rakas v. Illinois*, 439 U.S. 128, 135 (1978)]
 12 (holding that the mere fact that a person is "legitimately on premises where
 13 a search occurs" is not enough to show that the search infringed the person's
 14 expectation of privacy); *United States v. Armenta*, 69 F.3d 304, 309 (9th Cir.
 15 1995) (evidence suggesting, at most, that defendant was legitimately on the
 16 premises searched was "insufficient to demonstrate a legitimate expectation
 17 of privacy").

18 *Id.*

19 Likewise, in this case, the fact that Defendant was briefly at the Residence to
 20 conduct a drug transaction with the co-defendant did not give him a reasonable expectation
 21 of privacy in the Residence.³

22 Defendant argues that the Court should follow the Ninth Circuit's decision in *United*
 23 *States v. Nerber*, 222 F.3d 597, 604 (9th Cir. 2000), which distinguished *Carter*. But the
 24 Court finds this case to be much more like *Carter* than *Nerber*. Like the defendants in
 25 *Carter*, Defendant in this case visited the Residence briefly, to conduct a drug transaction,
 26 with no apparent prior connection to the co-defendant or the Residence. Furthermore, he
 27 was observed by the pole camera for only 11 minutes and while engaged in publicly-visible
 28 activities. In *Nerber*, by contrast, the defendants were invited into a hotel room by

29 ³ Defendant argues that the holding in *Carter* has been undercut by the Supreme
 30 Court's subsequent decision in *Jones*, 565 U.S. 400, but *Lyall* was decided after *Jones* and,
 31 as it explained, is wholly consistent with that decision. *See Lyall*, 807 F.3d at 1185-87.
 32 Nor does the Court find that *Carpenter v. United States*, 138 S. Ct. 2206 (2018), a decision
 33 on cell site location information, reduces the relevancy of *Carter* and *Lyall*.

1 informants working for the government and later were left alone in the hotel room without
 2 knowledge that they were being recorded by a concealed video camera. 222 F.3d at 599.
 3 The Ninth Circuit looked to the degree of the intrusion in determining whether the
 4 defendants had a reasonable expectation of privacy. *Id.* at 602-03. It held that although
 5 the defendants had no reasonable expectation of privacy while the informants were in the
 6 room, they gained such a reasonable expectation once the informants left the room, given
 7 the severe nature of the government's intrusion:

8 We also agree with the district court, however, that once the informants left
 9 the room, defendants' expectation to be free from hidden video surveillance
 10 was objectively reasonable. When defendants were left alone, their
 11 expectation of privacy increased to the point that the intrusion of a hidden
 12 video camera became unacceptable. People feel comfortable saying and
 13 doing things alone that they would not say or do in the presence of others.
 14 This is clearly true when people are alone in their own home or hotel room,
 15 but it is also true to a significant extent when they are in someone else's home
 16 or hotel room. Even if one cannot expect total privacy while alone in another
 17 person's hotel room (i.e., a maid might enter, someone might peek through a
 window, or the host might reenter unannounced), this diminished privacy
 interest does not eliminate society's expectation to be protected from the
 severe intrusion of having the government monitor private activities through
 hidden video cameras.

18 *Id.* at 604.

19 This case is different. Defendant was not videotaped in a private setting where he
 20 thought he was alone. The only video surveillance of Defendant occurred while he was in
 21 full public view, arriving at the Residence, entering the garage, and departing. No
 22 surveillance occurred while he was in the garage. There simply is no intrusion in this case
 23 comparable to *Nerber*.

24 Because the Court finds that Defendant had no reasonable expectation of privacy at
 25 the Residence, Defendant cannot assert a Fourth Amendment violation based on the pole
 26 camera's surveillance of the Residence.

27 **IT IS ORDERED** that Defendant's motion to suppress (Doc. 91) is **denied**.

28

1 Excludable delay pursuant to U.S.C. § 18:3161(h)(1)(D) is found to run from
2 9/4/2019.

3 Dated this 17th day of October, 2019.

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5 David G. Campbell
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7 David G. Campbell
8 Senior United States District Judge
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